

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 14-01840-smb

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5 In the Matter of:

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7 Irving H. Picard, v. Susanne Stone Marshal et al.

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9 Debtors.

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11

12 United States Bankruptcy Court

13 One Bowling Green

14 New York, New York 10004

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16 May 1, 2014

17 10:50 AM

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21 B E F O R E:

22 HON. STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: F. FERGUSON

1 HEARING re Defendants' Motion for Stay of Proceeding and  
2 Extension of Time.

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25 Transcribed by: Theresa Pullan

1 A P P E A R A N C E S :

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P R O C E E D I N G S

THE COURT: Madoff. Who represents the movants?

MR. SMITH: I do, Your Honor. Peter Smith of Becker and Poliakoff for the movants. Susan Marshal (phonetic) of Dell Fox, Russell Oasis and Marcy Harris. And if it's okay with Your Honor, we'll stick with the convention in our papers and refer to them as the Florida plaintiffs.

THE COURT: Okay.

MR. SMITH: So, Your Honor --

THE COURT: Although there are other Florida plaintiffs.

MR. SMITH: There are. We call them I think the Goldman Florida plaintiffs. But I don't know if they're even here today. So, Your Honor, what we've asked for is a stay of the trustee's fairly recently filed action which seeks the enforcement of a permanent injunction and the automatic stay with the connection with the trustee's settlement with the Picards.

This is effectively round 2 because when my clients initially filed suit in federal court in Florida against the Picards, the trustee came up here and got an injunction against that suit and that was upheld by the District Court and then eventually the Second Circuit affirmed the injunction, but it did so without prejudice. And in its decision it specifically said this is without prejudice and the issue of whether the

1 plaintiffs here can put together a complaint that would not  
2 violate the permanent injunction is for the Florida court to  
3 decide.

4 THE COURT: In the first instance.

5 MR. SMITH: In the first instance, thank you.

6 THE COURT: So you went to the Florida court. What  
7 happened?

8 MR. SMITH: We do what we're told.

9 THE COURT: Okay.

10 MR. SMITH: We go to Florida, and while the motion  
11 for leave to amend is pending along with the motion to reopen  
12 the case, the Picards come into court and they say hold on  
13 Judge Ryskamp you know you should hold off on this because the  
14 trustee is about to do something up in New York and here's Mr.  
15 Murphy's letter where he says, hey, that complaint down in  
16 Florida violates the injunction in the stay so would you please  
17 stop everything here. So the trustee interfered with that  
18 proceeding.

19 THE COURT: Or exercised his rights.

20 MR. SMITH: Exercised his rights. But if he  
21 exercised his rights, he was in violation of the Court's  
22 mandate. Second Circuit --

23 THE COURT: How do you figure?

24 MR. SMITH: Well, the Second Circuit said that the  
25 Florida court is to decide. There's no dispute, it's not

1 vague, there's no room for interpretation.

2 THE COURT: I thought you said you could present it  
3 in the first instance in the Florida court.

4 MR. SMITH: And it is to decide in the first  
5 instance.

6 THE COURT: How can the Second Circuit decide?

7 MR. SMITH: It can't, but it can tell the parties  
8 what they ought to do, and the exact language is to decide in  
9 the first instance.

10 THE COURT: So you make this argument to the District  
11 Court Judge in Florida and what happens?

12 MR. SMITH: We didn't make that argument.

13 THE COURT: You didn't?

14 MR. SMITH: no, the Court granted the Picards  
15 injunction.

16 THE COURT: I thought --

17 MR. SMITH: And he deferred.

18 THE COURT: I thought I saw papers submitted to the  
19 Judge on these various motions in Florida which you argued that  
20 the mandate required the Florida Judge to decide the issue.

21 MR. SMITH: Well we said, what we actually did was we  
22 made a cross motion to enjoin the plaintiff for having the case  
23 litigated any place but there.

24 THE COURT: And that was essentially, at least the  
25 issue of the injunction was denied, the Court abstained

1 essentially.

2 MR. SMITH: Correct. And he deferred, he said he  
3 would defer to the action after the trustee filed here --

4 THE COURT: Right.

5 MR. SMITH: -- he said he would defer it to this  
6 Court on that motion or the action that he filed. And we've  
7 appealed that decision to the Eleventh Circuit. And what we're  
8 asking is for this Court to stay its hand until the Eleventh  
9 Circuit rules on that application. There's no uncertainty  
10 about what the Second Circuit wanted. It is not dicta.

11 There's nothing in, it's a 28 page decision and there's nothing  
12 in that decision that is contrary to or inconsistent with the  
13 Court saying go to Florida and have them deal with this. It  
14 could have easily said put together a proposed complaint and  
15 show it to the Bankruptcy Court, I can remand to them.

16 THE COURT: You know, the Bankruptcy Court isn't a  
17 gatekeeper when you have these kind of injunctions. Usually  
18 somebody reacts to something, it's often a sale order. For  
19 instance, in Chrysler I get a lot of "referrals" from other  
20 federal courts to interpret the sale order, it's very common.  
21 So that you present, the issue is presented to the District  
22 Court Florida in the first place, and it abstained in favor of  
23 this Court to interpret the scope of the injunction. How is  
24 that inconsistent with the mandate?

25 MR. SMITH: Well, I'm not sure if there was a, in

1 those cases you're talking about that the Appellate Court has  
2 spoken to where the issue should be decided.

3 THE COURT: Let me ask you something. Let me ask you  
4 a question. Based on your interpretation of the mandate --

5 MR. SMITH: Yes.

6 THE COURT: -- if the Eleventh Circuit doesn't  
7 entertain the appeal because it's interlocutory or affirms what  
8 Judge Ryskamp did, where are we, where does the issue get  
9 decided?

10 MR. SMITH: If we lose in the Eleventh Circuit?

11 THE COURT: Yeah.

12 MR. SMITH: Then I suppose this case will proceed.

13 THE COURT: How can it if the Second Circuit's  
14 mandate is that the Florida court should consider.

15 MR. SMITH: Well in that instance the Second Circuit  
16 would have, it was presented and they decided, they decided not  
17 to do anything.

18 THE COURT: Okay. But that's what happened in  
19 District Court? It was presented in the District Court and the  
20 District Court decided not to abstain.

21 MR. SMITH: I would suggest that they didn't decide  
22 on the merits.

23 THE COURT: They certainly didn't decide on the  
24 merits. I agree with you on that.

25 MR. SMITH: And what we're asking for simply is to

1 rather than talk hypothetically about what might happen and  
2 what some order might say, why don't we just stick with what  
3 has happened which is the Second Circuit said let Florida  
4 decide. And we've made a motion not to decide whether that's,  
5 you know, frankly, there's plenty of ways Your Honor could  
6 grant our motion without having to decide what the mandate was.  
7 Your Honor could simply look at the standard factors that Your  
8 Honor has held in the case of Hagersten Fiber (phonetic) that  
9 are appropriate to grant a stay, to promote judicial economy,  
10 to avoid confusion and to avoid possible inconsistent results.

11 THE COURT: How are you irreparably harmed if I  
12 decide the matter?

13 MR. SMITH: There will be potentially very  
14 inconsistent decisions, we'll be harmed by having to litigate  
15 here and there. On the contrary, the trustee, first of all the  
16 trustee does not dispute any of those factors and if you want  
17 to talk about harm, the trustee is not harmed in any way, not a  
18 single way if Your Honor says I'm not going to do anything  
19 here, I'm going to stay this until the issue is decided in  
20 Florida. Because after all, if the Florida court ever gets to  
21 the merits and it says so sorry, I've read the Second Circuit  
22 decision and this complaint you put together, it's just as bad  
23 as the first one, well then we don't get to file anything. And  
24 everything that we will do here in the interim such as go have  
25 an argument next week on the motion to enforce and then

1 potentially an appeal for that, that will all be a waste of  
2 time.

3 If this Court issues the stay for just as long as it  
4 takes for the Florida court to decide whether our complaint  
5 meets the test or not that the Second Circuit laid down, then  
6 nothing will happen that will violate the permanent injunction  
7 nor anything happen that could possibly interfere with the  
8 administration of the estate or the automatic stay. It's  
9 simply -- but if you say I'm denying your motion, Smith, we're  
10 going to proceed here, think about what could happen. Someone  
11 is going to be disappointed with however you rule next week on  
12 their motion.

13 THE COURT: That happens every day.

14 MR. SMITH: Right. And someone is going to appeal,  
15 right? And so we're going to be in front of --

16 THE COURT: That happens every day also.

17 MR. SMITH: We'll be in the District Court, and  
18 before long we'll be back in front of the Second Circuit. And  
19 I imagine the Second Circuit -- and all the while things will  
20 rage on in Florida. And imagine the disappointment of the  
21 Second Circuit when we come back to them and, why are you here.  
22 Well, we went to Florida just like you said and Mr. Picard, he  
23 didn't listen to you, instead he interfered with what was going  
24 on down here, and he comes up here and he files a motion before  
25 we had a chance to get a decision from the Florida court.

1 THE COURT: But that's --

2 MR. SMITH: So we're here because --

3 THE COURT: But that, his interpretation of the  
4 decision was that this Court should decide it.

5 MR. SMITH: Okay. Well I wonder is it possible --

6 THE COURT: Who decides that?

7 MR. SMITH: Well the Second Circuit will decide if  
8 they meant what they said when they wrote it.

9 THE COURT: No, I'm saying why can't I decide that  
10 since the issue is presented to me now.

11 MR. SMITH: I suppose you could decide it, but that  
12 doesn't take it away from the Florida court.

13 THE COURT: No. What the Florida courts do, take it  
14 away from me.

15 MR. SMITH: Well, then we're just going to go like  
16 this. We're going to -- something is going to happen next week  
17 on their motion to enforce, something is going to happen with  
18 our appeal, and these two cases will go like this and  
19 eventually I suppose we'll be in front of the Second Circuit  
20 and they're going to be, they'll be scratching their heads, how  
21 did this happen.

22 THE COURT: Maybe you'll get an Eleventh Circuit  
23 Judge sitting by designation.

24 MR. SMITH: Well I don't know if that's going to  
25 happen. But as I was saying, Your Honor, there's factors, you

1 have discretion to stay things, and you've articulated what  
2 those factors are in the case recently. I would add to that  
3 list, it's appropriate to issue a stay where to do otherwise  
4 might violate the Second Circuit's mandate. But you know what,  
5 if you don't want to decide that, and they haven't argued that  
6 those three things are present here, and they haven't  
7 articulated any harm -- but I would just add this -- if you  
8 don't want to decide whether it's the mandate or not, it's  
9 certainly not dicta, I mean, it's about this case.

10 THE COURT: Well, it wasn't an issue before the  
11 Second Circuit.

12 MR. SMITH: Correct. Well the Court has to say what  
13 happens next. Right? Setting a case for remand is not an  
14 issue.

15 THE COURT: They didn't have to say that for the  
16 decision.

17 MR. SMITH: They had -- but they did.

18 THE COURT: Okay, but it's not, in other words, it's  
19 not part of [indiscernible].

20 MR. SMITH: Okay. I'll grant you that they didn't  
21 have to say and go to Florida, they didn't have to say that.

22 THE COURT: Right.

23 MR. SMITH: But they did. And they also said without  
24 prejudice. Where else were we supposed to go to file an  
25 amended complaint? There's only one place you can go.

1 THE COURT: Well that's certainly true.

2 MR. SMITH: So it's -- and moreover, they said in the  
3 first instance, they didn't say you go to Florida, plaintiffs,  
4 and Mr. Picard, you go back to the Bankruptcy Court and we'll  
5 see what happens, you guys have a race to judgment or  
6 something. It's crazy to think that they wanted that.

7 THE COURT: Do you think the Second Circuit was  
8 actually deciding that issue in the context of this appeal?

9 MR. SMITH: I'm sorry?

10 THE COURT: Do you think the Second Circuit was  
11 actually deciding the issue of whether or not you go to Florida  
12 or you come here?

13 MR. SMITH: Absolutely. Why else would they say  
14 Florida?

15 THE COURT: Was it argued by any of the parties in  
16 their briefs?

17 MR. SMITH: No.

18 THE COURT: The Circuit usually doesn't decide issues  
19 that aren't argued.

20 MR. SMITH: But they decide issues whether the people  
21 argued or not that have to be made. I mean if I tell you I'm  
22 going to dismiss your complaint without prejudice, and by the  
23 way, here's a list of 15 things that were wrong with your  
24 complaint and this is how, if you want to put together a  
25 complaint against the Picards that won't violate the permanent

1 injunction, here's what you've got to do. You've got to  
2 identify some particularized injury, you have to identify  
3 something that Mr. Picard did that wasn't directed, that was  
4 directed specifically at some investors as opposed to just  
5 trying to get money out of his account. And so I'm dismissing  
6 this without prejudice because I recognize that you might be  
7 able to do that. So go back to Florida and let them decide in  
8 the first instance. This is, that's not happening today. Do  
9 you know who is deciding that in the first instance?

10 THE COURT: It is. It is because you went to Florida  
11 and Florida court abstained.

12 MR. SMITH: And, okay, and they didn't decide and now  
13 we're waiting for the Eleventh Circuit to say, which I imagine  
14 they will, to their brothers down in the District Court how is  
15 it possible you didn't listen to what the Second Circuit said.  
16 Circuit courts are entitled to have their mandates followed,  
17 even if it's not from us. Then fine, we'll tell you.

18 THE COURT: Do you have an argument date for the  
19 Eleventh Circuit?

20 MR. SMITH: We have an argument -- no, what we have  
21 is and we've done everything to speed it up, we've asked for an  
22 expedited appeal on the interlocutory stay while that appeal is  
23 pending. And they've said to us, it's not like, they said well  
24 how soon do you need it. And we said May 5th so that possibly  
25 we can get something before that motion happens. And they

1 haven't said well that's too soon, so we don't know. But we're  
2 anticipating since it's fully briefed at this point that the  
3 issue of the stay pending the appeal will be decided before you  
4 have to decide --

5 THE COURT: The court stay pending appeal.

6 MR. SMITH: We made, we took an appeal from the  
7 decision that deferred, and then we made a motion for a stay, a  
8 preliminary stay of everything while they decided that appeal.

9 THE COURT: The stay in Florida.

10 MR. SMITH: Of, and of the trustee.

11 THE COURT: But the trustee is not a party to the  
12 Florida suit.

13 MR. SMITH: He's not a party, but he's, he can deny  
14 it, but he's clearly acting in concert with the Picards.

15 THE COURT: Well, I know you allege that.

16 MR. SMITH: Well he's in privity with the Picards,  
17 there's no question about it.

18 THE COURT: He's in privity?

19 MR. SMITH: Absolutely. And the only reason he's  
20 doing this is because he has a contractual obligation to do it.

21 THE COURT: Okay.

22 MR. SMITH: And we know that he's abiding by it  
23 because Mr. Murphy wrote a letter to the Picards' attorney and  
24 said don't worry, here we come to save the day. So yeah, I  
25 think we'll be able to make out an argument that they are in

1     privity.

2                 THE COURT: Did you ever move in the District Court  
3     in Florida for a stay of that decision?

4                 MR. SMITH: We -- no, we took the appeal to the  
5     Eleventh Circuit, not back to the Judge who had punted it to  
6     you.

7                 THE COURT: But don't you have to move for a stay in  
8     the District Court before you move for stay in the Circuit?

9                 MR. SMITH: I hope not because that's not what we did  
10    and that may be one of the things that the Picards are saying  
11    in opposition to our motion for --

12                THE COURT: You usually have to move for a stay  
13    pending appeal in the lower court.

14                MR. SMITH: I'm familiar with that practice, I wasn't  
15    involved, our Florida attorneys are doing that. But as to your  
16    other answers, the appeal itself we have requested and have  
17    been granted permission for an expedited appeal and if  
18    everything goes according to the scheduled that we submitted  
19    for the expedited appeal, they will have the matter fully  
20    briefed by May 23rd. And in light of the fact that they  
21    realize that this, there are some things happening here and we  
22    would probably mention the fact that if things go the way I  
23    hope today that Your Honor has stayed things here until they  
24    decide, then I have a feeling that they'll decide it relatively  
25    quickly. And if they decide that we're wrong and then I guess

1 that in the meantime the trustee is not harmed because we're  
2 not doing anything, we're not going after the Picards right  
3 now.

4 THE COURT: Well the trustee has a stay.

5 MR. SMITH: He what?

6 THE COURT: He effectively has a stay now.

7 MR. SMITH: He has a stay of us, yeah, because we're  
8 not doing anything. So all we're asking is to stay his lawsuit  
9 here which includes unfortunately a motion that's going to be  
10 on May 7th, I think to say that we're in violation of the  
11 permanent injunction when it could be totally moot, because if  
12 the Eleventh Circuit rules against us then where are we, it  
13 wouldn't have mattered.

14 THE COURT: I'm sure you'll come up with another --

15 MR. SMITH: I'm not saying we won't come up with  
16 something, but he'll be in a lot better shape to say, see we  
17 told you. And if you stayed in the meantime, no one is hurt.  
18 And you know there's a, if you don't want to call it a mandate,  
19 you can't deny that the Second Circuit was giving some  
20 directions to the parties, right, and there's, the Second  
21 Circuit has said, you know, there's dicta and then there's  
22 dicta, and this ain't the kind of dicta you should ignore.  
23 There's something called judicial dicta or considered dicta.  
24 And you can't deny that they went through the trouble, it's in  
25 the decreed paragraph, for crying out loud, if they wanted it

1 to be heard there. It's like they're saying, you know what,  
2 get out of my Circuit, let the Florida guys decide this and let  
3 them decide it first which has to be a message to the trustee,  
4 let that court decide first, because where else are we going to  
5 go. I mean it's a message to the trustee. You know, you don't  
6 have to tell us where to file our motion to amend, and they  
7 violated that. And whether you want to call it a mandate,  
8 okay, fine, you're not in violation of the mandate, it's  
9 judicial dicta at minimum and this Court should heed it. And  
10 all we're asking for, we're not asking to rule on the merits of  
11 anything, is to just hold on, stop this, no one will be hurt if  
12 we sit tight and do nothing until the Eleventh Circuit decides.

13 THE COURT: Okay.

14 MR. SMITH: And that's all I have unless Your Honor  
15 has any questions, and I reserve some opportunities to respond  
16 to Mr. Murphy.

17 THE COURT: Thank you.

18 MR. SMITH: Thank you, Your Honor.

19 MR. MURPHY: Good morning, Your Honor, Keith Murphy,  
20 Baker and Hostettler for the trustee. I also note that counsel  
21 for the Picards is in Court today, Ms. Marcy Harris.

22 MS. HARRIS: Good morning.

23 MR. MURPHY: Your Honor, I agree with all the Court's  
24 insights today.

25 THE COURT: I was just raising questions. I may

1 ultimately approve them, but go ahead.

2 MR. MURPHY: I think Your Honor there are really two  
3 fundamental questions to really address this motion here today.  
4 Really, does this Court still have jurisdiction to enforce the  
5 permanent injunction and should it. The answer to that is  
6 both, yes. There's a lengthy history here of litigation  
7 involving the trustee's settlement with the Picards and the  
8 injunction and his efforts to make sure that people don't bring  
9 duplicative and derivative claims.

10 THE COURT: But you know this is really, and I read,  
11 I know why you're here, I read the contract, but this is really  
12 a dispute between the Picards and the Florida plaintiffs at  
13 this point. I don't really know how it concerns the estate  
14 other than you have this contractual obligation to do this.

15 MR. MURPHY: Well, it's more than that, Your Honor,  
16 far more. Because really we're here protecting the estate's  
17 interest, and we're here protecting the --

18 THE COURT: What's the interest to the estate?

19 MR. MURPHY: The estate, the claims that have been  
20 settled her with respect to the estate were contained in the  
21 settlement. And those claims are now protected by the  
22 permanent injunction. Our argument, Your Honor, is that now  
23 while we've looked at the new complaint filed or potentially  
24 filed by the Fox plaintiffs and those claims are duplicative  
25 and derivative, yet again --

1 THE COURT: I understand that, but why can't the  
2 Picards who are obviously beneficiaries of the injunction make  
3 that argument in Florida? Why is the trustee involved in this  
4 is what I'm asking.

5 MR. MURPHY: The trustee is protecting the permanent  
6 injunction. We can't have the permanent injunction's  
7 provisions eroded. We also don't want this Court's  
8 jurisdiction to be eroded by having to go to various courts  
9 around the country to suggest that there's violations of the  
10 permanent injunction. That's not where the trustee wants to  
11 be. The trustee is here in a centralized proceeding before  
12 this Court in a [indiscernible] liquidation proceeding.

13 THE COURT: I understand that. But the permanent  
14 injunction runs solely to the benefit of the Picards. Why does  
15 the trustee care how another court interprets the permanent  
16 injunction of this case?

17 MR. MURPHY: Your Honor, we believe that this Court  
18 should be interpreting its own jurisdiction, should be  
19 interpreting its own permanent injunction order. We do care  
20 because we --

21 THE COURT: All right. I have jurisdiction, I saw I  
22 have jurisdiction. Basically, the Florida plaintiffs are  
23 asking me to abstain from deciding the preliminary injunction,  
24 or the injunction motion.

25 MR. MURPHY: And I don't, I disagree that the Second

1 Circuit actually divested this Court of any jurisdiction with  
2 that one statement.

3 THE COURT: I agree with you I have subject matter  
4 jurisdiction.

5 MR. MURPHY: Okay.

6 THE COURT: But what they're saying is don't rule,  
7 let the Florida courts rule and they haven't said it, you know,  
8 it's really a, maybe this is what was driving the Second  
9 Circuit, this is a dispute between the Picards and the Florida  
10 plaintiffs, and it's really not a dispute that concerns the  
11 estate.

12 MR. MURPHY: Your Honor, we've --

13 THE COURT: And but for your contractual provision,  
14 it would always be the beneficiaries of the injunction --

15 MR. MURPHY: Well certainly.

16 THE COURT: -- who would bring this type of motion.

17 MR. MURPHY: Right. Your Honor, I agree, we  
18 certainly have a contractual provision which says we're going  
19 to use best efforts to enforce that injunction.

20 THE COURT: So you've done that.

21 MR. MURPHY: But I agree with that. But I also agree  
22 it's far more. I still maintain the position that we have an  
23 obligation to protect the permanent injunction that we've  
24 fought so hard for and went up all through appeals and we got  
25 through the Second Circuit. I think it does make a difference

1 to this Court that this Court has the ability and the right to  
2 go and enforce its own permanent injunction. I think all the  
3 questions or challenges that relate to it belong in front of  
4 this Court. I don't think it's appropriate that it be done in  
5 various jurisdictions throughout the country. Just for an  
6 example, what we've got here is beyond the Fox plaintiffs, we  
7 also have the Goldman plaintiffs down in Florida. They're  
8 actually before a different District Court Judge. We've got,  
9 it's a bit of a [indiscernible] down in Florida, quite frankly,  
10 Your Honor. We've got the Fox plaintiffs before Judge Ryskamp,  
11 he deferred it to this court, it's now on appeal. You have the  
12 Goldman plaintiffs before Judge Morrow [indiscernible], he  
13 hasn't ruled any way.

14 THE COURT: And they contend they represent the Fox  
15 plaintiffs.

16 MR. MURPHY: Contending, exactly. So on top of that,  
17 you've got a real dispute here as to who represents whom. And  
18 that also hasn't been decided. But the Goldman plaintiffs have  
19 also intervened not only in the District Court before Judge  
20 Ryskamp, but now before the Eleventh Circuit as well as saying  
21 we don't think you are properly representing. But all that  
22 goes to say, Your Honor, is that you've got a lot, they're  
23 asking a lot of people, a lot of Judges, courts down in Florida  
24 to interpret this Court's permanent injunction. And they're  
25 also asking courts down in Florida to interpret the Second

1 Circuit's "mandate" which we think is really not a mandate at  
2 all. That decision clearly from our perspective, certainly  
3 affirm this Court's jurisdiction to make these rulings and  
4 enter the permanent injunction.

5 I also disagree with my colleague that there's no  
6 harm here. In terms of a stay pending appeal, I don't think  
7 they've demonstrated to this Court that they have a likelihood  
8 of success on the merits. I think that they would have to go  
9 before the Eleventh Circuit and get past the hurdle of that  
10 they brought, this is not an improper interlocutory appeal that  
11 this is somehow a mandate directing the Florida District Court  
12 that it has no choice but to hear this and interpret it, and  
13 they also have to determine that it wasn't a mistake to bring  
14 it down there. I do see the harm here to us. I don't see any  
15 irreparable harm to the Fox plaintiffs at all, Your Honor, to  
16 have to litigate here for something that they did already.

17 And by the way, in addition to that, if we're going to go  
18 up on appeal as my colleague suggested, I think it's a better  
19 place to go up on appeal before the Second Circuit so that they  
20 can interpret their own mandate.

21 Just to the point about the mandate, Your Honor, and  
22 the Court made comments or raised some questions about it  
23 before with my colleague, clearly it's a 28 page decision  
24 reaffirming jurisdiction. The one sentence that they're trying  
25 to isolate here to get this Court to stay this is it was not an

1 issue before the Court, it wasn't litigated, wasn't in any of  
2 the briefs, it wasn't in any of the decisions, it was  
3 unnecessary as the Court questioned to the decision at all. So  
4 therefore, I don't think there's any weight that should be  
5 afforded to it. I don't know at all that it has any bearing on  
6 where we are. And in fact, I do think that the Second Circuit  
7 knowing how bankruptcy cases work, and even as Your Honor has  
8 said before, there are, the jurisdiction of the bankruptcy  
9 courts to make these determinations, to make determinations of  
10 its own orders should be centralized here in the Court where  
11 the case is proceeding.

12 I'll add, Your Honor, too, it's not only this  
13 particular injunction, this permanent injunction, but it also  
14 would affect the estate in other ways. We certainly, it would  
15 affect how we could go forward with other settlements and what  
16 other settling parties could potentially expect in the future.  
17 And then anyone frankly with duplicative claims could go to  
18 other courts and raise those issues and then have the trustee  
19 have to run down there as they're suggesting. They're  
20 suggesting, Fox plaintiffs are suggesting that we should be  
21 going down to Florida to intervene, to protect this Court's  
22 permanent injunction. We don't think that's appropriate, Your  
23 Honor.

24 I think that all the litigation down in Florida  
25 should really, would really ultimately be stayed if this Court

1 enters the injunction application that we're going to be before  
2 you on next week. And by the way, Your Honor, the Goldman  
3 plaintiffs have not sought a stay. We are going next week on  
4 the 7th before you here to address our application. There's no  
5 reason to separate these two, Fox plaintiffs and Goldman  
6 plaintiffs. Our position is that these complaints are very  
7 similar, they are simply realleging claims that the Picards --

8 THE COURT: Don't argue the merits today.

9 MR. MURPHY: Sure. Sure. So we really like to avoid  
10 any kind of inconsistent interpretations of the permanent  
11 injunction. We think that if it's brought here and all these  
12 cases are brought here, this Court will have a uniformed way of  
13 looking at the permanent injunction and enforcing it. It would  
14 not erode this Court's jurisdiction in any way. And as I said,  
15 there's no basis for a stay pending appeal, Your Honor.  
16 There's no, no irreparable harm for them to litigate before you  
17 because they haven't demonstrated they're likely to succeed on  
18 the merits. Our trustee's position is that we will be harmed,  
19 the Court will be harmed and the public interest frankly lies  
20 in having all these matters heard before the Bankruptcy Court,  
21 Your Honor.

22 And by the way, just one more point. The issue  
23 regarding duplicative and derivative, the nature of the claims  
24 will be fully briefed here as of this afternoon when we file  
25 our brief. However, no briefing on that issue has occurred in

1 Florida. We don't know anything about the May 5th date that  
2 counsel alluded to, and there is no indication that the  
3 Eleventh Circuit is going to rule at any particular time, we  
4 haven't been able to see that.

5 THE COURT: Okay. Thank you.

6 MR. MURPHY: Thank you, Your Honor.

7 THE COURT: Before I hear from Mr. Smith, does  
8 anybody else want to be heard?

9 MS. HARRIS: Your Honor, I'm Marcy Harris from  
10 Schulte, Roth and Zabel, we're counsel to the Picard parties.  
11 And we support the trustee's application in this Court, and the  
12 arguments in the trustee's motion and memorandum of law and the  
13 relief the trustee seeks, and we oppose the Florida plaintiffs'  
14 applications here.

15 I want to clarify for the record what's happening in  
16 Florida and the status of the proceedings. As of now, the  
17 Florida plaintiffs who are here in Court today have made three  
18 different motions before the Eleventh Circuit. One is a motion  
19 to, a motion to expedite an appeal. They waited three weeks to  
20 make that motion, to say that they needed an expedited  
21 schedule. There's no schedule --

22 THE COURT: That's for the Eleventh Circuit to  
23 decide.

24 MS. HARRIS: Sure. But there's no, the point is  
25 there's no dates at all on when the court is going to rule on

1 any of the applications before it, there's no briefing schedule  
2 on an expedited basis, and so when the Eleventh Circuit would  
3 complete and decide on the issues is unknown. The Florida  
4 plaintiffs also moved for an injunction pending appeal.

5 THE COURT: An injunction for what?

6 MS. HARRIS: Of Judge Ryskamp, the District Court's  
7 stay determination.

8 THE COURT: Okay.

9 MS. HARRIS: That motion is fully briefed, again  
10 there's no indication when it will be decided. The Picard  
11 parties moved to dismiss the appeal on the grounds that it's  
12 interlocutory and there's no basis for that to be taken now.  
13 That is fully briefed, there's no determinations, no indication  
14 when that will be determined. So there is no -- I heard  
15 counsel say today that within a few days there should be an  
16 opinion from the Eleventh Circuit. We believe that's a  
17 speculative, that's totally speculative.

18 Without addressing the merits of whether the new  
19 complaint is derivative or duplicative or not, the only  
20 question is which court is best to decide that issue, and we  
21 submit it's the court that has already decided that issue,  
22 that's this Court, then the District Court and then the Court  
23 of Appeals here. And the Second Circuit, excuse me, the  
24 Eleventh Circuit has never addressed that issue, the Florida  
25 courts have never addressed that issue. When presented to them

1 three years ago, four years ago, they stayed in favor of this  
2 Court's determinations of that very issue. The Goldman parties  
3 who will be before the Court next week on the 7th have never  
4 filed in Florida before. They brought their application to  
5 this Court four years ago seeking permission to file their  
6 complaint at that time. The Court rejected that application on  
7 the grounds that their claims were duplicative of the  
8 trustee's, that was appealed to Judge Sullivan. Unfavorably  
9 they lost. They then filed again in Florida this winter. So  
10 that was the proper procedure, they did it the last time, they  
11 got an unfavorable result. They tried something else by going  
12 to Florida. But the, this Court in the order approving the  
13 settlement with the Picard parties approved the permanent  
14 injunction. So it's a court order of this Court, and we  
15 believe this court is best situated in the proceeding that the  
16 trustee is a part of to determine the scope of that injunction  
17 and whether it applies to these new claims. Otherwise, a  
18 different court is going to be deciding whether purportedly new  
19 claims are derivative and duplicative of the same claims this  
20 Court has already addressed. Thank you.

21 MR. SMITH: Your Honor, maybe I was being too polite.  
22 I thought the Picards' attorney was merely going to say we join  
23 in everything that the trustee said, but to my knowledge  
24 they've made no appearance in this matter. I don't understand  
25 why they should have any say in this.

1 THE COURT: A little late for that, isn't it?

2 MR. SMITH: That's why I said I regret that I was as  
3 polite as I was.

4 THE COURT: You might have been in the same place  
5 anyway.

6 MR. SMITH: First, let me just say one more thing  
7 about, what I did not say that an opinion will be, we  
8 anticipate it. They asked us when you need it by, and we said  
9 May 5th, and they didn't say oh, you're crazy, that's too soon.  
10 So we anticipate they're going to do that. They may not, I  
11 don't know. Even if our expedited appeal is not granted, we're  
12 not talking about an appeal that's going to be set out to next  
13 year some time. If we just proceed under the regular briefing  
14 schedule, our papers will be in on May 5th by coincidence and  
15 the opposition will be due June 5th, so we're not talking about  
16 something that's going to drag on for years and years and  
17 years. Now with that said, I can empathize with -- Mr. Murphy  
18 and I have been round and round this since it was first filed,  
19 and I can empathize with him, we file the motion that I'm sure  
20 how could the Judge --

21 THE COURT: Could you hold it down back there,  
22 please? I'm sorry, go ahead.

23 MR. SMITH: So we would file our motion for a stay,  
24 and frankly nothing has been said and the papers are here today  
25 that is grounds to deny it. And when they have nothing to say

1 addressing what we've said, they frankly just made something up  
2 which is somehow we're arguing this Court doesn't have  
3 jurisdiction. We never said that. It's not in our papers,  
4 they cite nothing in their papers.

5 THE COURT: Well I guess that's the implication  
6 saying, the mandate says go to Florida.

7 MR. SMITH: But that's not, no that doesn't say you  
8 don't have jurisdiction. But in any event, I mean we're asking  
9 for Your Honor to award fees to us for this frivolous activity  
10 up here, so we think you do have jurisdiction. You have  
11 jurisdiction to hear what they said and deny it, because  
12 otherwise, when it goes up on appeal, it will be reversed.

13 THE COURT: Do I have jurisdiction to grant it?

14 MR. SMITH: Do you have jurisdiction to grant what?

15 THE COURT: To grant --

16 MR. SMITH: My motion?

17 THE COURT: No, his motion.

18 MR. SMITH: I would say not. I mean, no, you would,  
19 you have jurisdiction --

20 THE COURT: I have jurisdiction to deny it, and I  
21 have jurisdiction, I have jurisdiction to award you attorneys'  
22 fees but I don't have jurisdiction to grant the relief that  
23 he's seeking?

24 MR. SMITH: I didn't understand your question. Yes,  
25 of course you do. But we submit it will be reversed by the

1 court that issued the mandate. That's, so it's not the same --

2 THE COURT: I don't doubt that.

3 MR. SMITH: Yeah, it's not the same thing as saying,  
4 you know, every time I seek to have a trial court reversed  
5 doesn't mean I think the court who issued the decision doesn't  
6 have jurisdiction.

7 THE COURT: Okay.

8 MR. SMITH: I mean we cross-moved to dismiss it last  
9 week.

10 THE COURT: So what's the effect of the mandate do?  
11 If I have jurisdiction, what does the mandate mean?

12 MR. SMITH: You can deny based on the fact that you  
13 have been instructed and you have an obligation to follow the  
14 mandate to let the other Judge decide first. I mean that's as  
15 clear as day and --

16 THE COURT: We're going around in circles. So you  
17 went to Florida and the other Judge said that I should decide  
18 it.

19 MR. SMITH: And keep going, the circle doesn't end  
20 there because we have an appeal. And the Eleventh Circuit may  
21 very well say, you know, I expected more of you District Court,  
22 you saw what the decision said, it said you're supposed to  
23 decide first. And I will add something. It's not as if Judge  
24 Ryskamp in Florida just said, you know, I got too much going on  
25 here, I'm not going to decide this. He didn't defer until

1 after the Picards filed a motion attaching Mr. Murphy's letter  
2 and he did not defer until the trustee filed here. It's not as  
3 if he said, oh, the heck with it I'm not going to do it.

4 THE COURT: Well maybe he thought although I have the  
5 power, that's an appropriate exercise of discretion under the  
6 circumstances.

7 MR. SMITH: We don't know why he did it, but I can  
8 ensure you that if the trustee hadn't meddled, he wouldn't have  
9 done it on his own.

10 THE COURT: You mean if the trustee hadn't asserted  
11 his rights?

12 MR. SMITH: I don't know how it's asserting your  
13 rights. Your rights are to listen to what the Second Circuit  
14 tells you to do.

15 THE COURT: Okay. Is there anything else?

16 MR. SMITH: Your Honor asked some very good questions  
17 about what's the harm. There is no harm to the trustee. They  
18 have -- no one will be able to accuse the trustee of not  
19 exercising his best efforts to protect the Picards from anyone  
20 violating the injunction. They've done it, it's over. There  
21 are no other injunctions out there that he needs to vindicate.  
22 This is the only one I'm aware of where there's a permanent  
23 injunction in place. Maybe perhaps Mr. Picard is trying to  
24 project his ability to offer deals like this to other people,  
25 but that doesn't mean he has the right to continue to do this.

1 You're absolutely right, what do you care Mr. Picard, you  
2 shouldn't be doing this.

3 And I would also like to add that [indiscernible] not  
4 appropriate for the other court to decide, he thinks you're  
5 appropriate. Well I guess he doesn't agree with the Second  
6 Circuit. The Second Circuit said the federal court in Florida  
7 should decide. It really doesn't matter what he thinks is  
8 appropriate. The Second Circuit has spoken and that's what we  
9 should be following. And unless there's some inconsistency in  
10 their opinion, we don't have room to interpret their mandate.  
11 We follow it. Thank you.

12 THE COURT: I'm going to reserve the decision, but  
13 we're going to go ahead with the schedule on the motion. The  
14 real issue I guess is what the mandate says, and my  
15 understanding is that the Goldmans have raised that in  
16 opposition to the motion for relief, so I can decide that  
17 matter in connection with the motion. So we'll go forward on  
18 that, I think it's the 6th.

19 UNIDENTIFIED: 7th.

20 THE COURT: 7th. We'll see you on the 7th.

21 UNIDENTIFIED: Thank you, Your Honor.

22 THE COURT: All right. Thank you.

23 (Proceedings concluded at 11:29 AM)  
24  
25

I N D E X

RULINGS

DESCRIPTION

PAGE

HEARING re Defendants' Motion for Stay of Proceeding and  
Extension of Time

CERTIFICATION

I, Theresa Pullan, certify that the foregoing is a  
correct transcript from the official electronic sound recording  
of the proceedings in the above-entitled matter.

Theresa Pullan

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